

(2018) 03 CHH CK 0296
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 607 of 2014

MANGAL @ DURYODHAN DANDPATH

APPELLANT

Vs

STATE OF CHHATTISGARH

RESPONDENT

Date of Decision : 27-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 323, 506, 375, 376, 506B
Protection of Children from Sexual Offences Act, 2012 — Section 2(1)(d), 6, 8

Citation : (2018) 03 CHH CK 0296

Hon'ble Judges : MANINDRA MOHAN SHRIVASTAVA, SHARAD KUMAR GUPTA

Bench : Division Bench

Advocate : Vishwanath Goswami, Wasim Miyan

Final Decision : Partly Allowed

Judgement

Sr. No.,Conviction u/S.,Sentence,Fine Sentence,"In default of payment
of fine

1.,"323, IPC",6 months RI,"Rs. 1,000/-",1 month RI

2.,"506-B, IPC",5 years RI,"Rs. 5,000/-",6 months RI

3.,"376, IPC",,"No separate sentence

is imposed",,

4.,"6, Protection of

Children from Sexual

Offences Act, 2012

(in brevity 'POCSO

Act')",Life imprisonment,"Rs. 25,000/-",1 year RI

yardstick can be rightly followed by the courts for the purpose of ascertaining the

age of a victim as well.â??,,,,

11. In the case in hand, prosecution had neither proved any educational certificate of the prosecutrix regarding her age nor any birth certificate given",,,,

by a Corporation or a Municipal Authority or a Panchayat.,,,,

12. P.W. 7 Dr. Sunil Ratre says in para 1 of his statement on oath that on 28-2-2013 he examined X-ray films of right wrist, right elbow and pelvic",,,,

bone of the prosecutrix and opined that the age of the prosecutrix was 15 years subject to 2 years plus-minus in both sides.,,,,

13. There is no such evidence on record on the strength on which it could be said that the said statement of P.W. 7 Dr. Sunil Ratre, in this reference",,,,

the alleged Report Ex. P-9, and alleged X-ray plates Article A-1 are not believable.",,,,

14. In Ex. P-1, the prosecutrix had stated her age about 15 years.",,,,

15. At the time of recording the statement of the prosecutrix in the Court on 6th August, 2013, the age of the prosecutrix was estimated 14 years.",,,,

16. P.W. 3 Sharda Mulik says in paras 1 and 2 of her statement on oath on 7-8-2013 that the age of the prosecutrix was about 13-14 years.,,,,

17. P.W. 5 Dr. D.K. Toppo says in paras 1 and 2 of his statement on oath on 3-9-2013 that on 28-2-2013 he examined the prosecutrix and found that,,,

she was an average built girl, 14-",,,,

14 teeth were present in upper and lower jaw, age of the prosecutrix was between 14 to 16 years.",,,,

18. There is no such evidence on record on the strength of which it could be said that the aforesaid allegedly stated age by the prosecutrix at the time,,,

of lodging Ex. P-1, allegedly aforesaid estimated age of the prosecutrix, aforesaid statement of P.W. 3 Sharda Mulik, aforesaid statement of P.W. 5",,,,

Dr. D.K. Toppo, in that reference his alleged report Ex. P-6, are not natural, not normal, not simple.",,,,

19. Looking to the above-mentioned facts and circumstances of the case, this Court finds that the aforesaid statement of P.W. 7 Dr. Sunil Ratre, in",,,,

that reference his alleged report Ex. P-9 and alleged X-ray films Article A-1, get corroboration from the aforesaid allegedly stated age by the",,,,

prosecutrix at the time of recording FIR Ex.P-1, allegedly aforesaid estimated age of the prosecutrix, aforesaid statement of P.W. 3 Sharda Mulik,",,,

aforesaid statement of P.W. 5 Dr. D.K. Toppo, and in that reference his alleged

report Ex. P-6, thus looking to the observation made in Mahadev's",,,,,

case (supra), this Court believes the aforesaid statement of P.W. 7 Dr. Sunil Ratre, in that reference his report Ex. P-9, X-ray films Article A-1.",,,,,

20. After appreciation of the evidence discussed hereinabove, this Court finds that 2-3 years prior to 28-2-2013, the prosecutrix was below the age of",,,,,

16 years.,,,,,

21. P.W. 5 Dr. D.K. Toppo says in para 4 of his statement on oath that hymen of the prosecutrix was old torn, she was habitual of sexual intercourse.",,,,,

He had prepared slides of her vaginal swab.,,,,,

22. There is no such evidence on record on the strength of which it could be said that the aforesaid statement of P.W. 5 Dr. D.K. Toppo, in that",,,,,

reference his report Ex. P-6 are not believable. Thus this Court believes the aforesaid statement of P.W. 5 Dr. D.K. Toppo, in that reference report",,,,,

Ex. P-6.,,,,,

23. P.W. 7 Dr. Sunil Ratre says in para 2 that the appellant was able to perform sexual intercourse. There is no such evidence on record on the basis,,,,,

of which it could be said that the said statement of P.W. 7 Dr. Sunil Ratre, in that reference report Ex. P-10 is not believable. Thus, this Court",,,,,

believes the aforesaid statement of P.W. 7 Dr. Sunil Ratre, and in that reference his report Ex. P-10.",,,,,

24. As per the alleged report of RFSL, Raipur Ex. P-19, sperms were found in the slides Article A-1 and Article A-2 of the prosecutrix.",,,,,

25. There is no such evidence on record on the strength of which it could be said that Ex. P-19 is not believable. Thus, this Court believes on Ex. P-",,,,,

19.,,,,,

26. P.W. 2 the prosecutrix says in paras 1, 2 and 3 of her statement recorded on 6th August 2013 that 3 years ago she along with her parents, her",,,,,

younger brother was going to her maternal aunt's house at village Koyla by train. She got down in some railway station for drinking water. The train,,,,,

departed from the railway station and she was left in that railway station. Thereafter, she reached at Raigarh railway station by changing the trains.",,,,,

The appellant met and promised her that he would leave her to her paternal house. The appellant kept her well for 10-11 days, thereafter he",,,,,

committed sexual intercourse with her. Whenever she opposed, he beat and threatened to kill her. Therefore, she did not tell about the incidents to",,,,,

anyone. When she met with a lady advocate, she narrated her about the incidents." , , , ,

27. P.W. 1 Santoshi Bai, mother of the prosecutrix says in para 2 of her statement on oath that her daughter- the prosecutrix had told her that the" , , , ,

appellant used to commit sexual intercourse with her and used to give threat to beat her. , , , ,

28. P.W. 3 Sharda Mulik says in para 2 of her statement on oath that on 28-2-2013, the prosecutrix came to her house and told that 3 years ago, she" , , , ,

reached Raigarh by a train by mistake, the appellant told her to leave her to her parental home. Few days after, the appellant started committing" , , , ,

sexual intercourse and whenever she opposed, he used to beat her and give threat to kill her." , , , ,

29. P.W. 1 Shantoshi Bai says in para 1 during examination-in-chief that 3 years ago, the prosecutrix and her (Santoshi Bai's) son had gone away" , , , ,

from the house without intimation. , , , ,

30. If the prosecutrix allegedly had gone from the house without intimation then P.W. 1 Santoshi Bai would not have not made the aforesaid statement, , , ,

of para 2. Moreover P.W. 1 Santoshi Bai is an illiterate lady and this possibility cannot be ruled out that she has made the aforesaid statement of para, , , ,

1 because she could not understand the facts properly. If these circumstances, aforesaid statements of P.W.2 prosecutrix, P.W. 3 Sharda Mulik are" , , , ,

considered, then this Court finds that the aforesaid statement of para 1 of P.W. 1 Santoshi Bai does not affect the credibility of her statement of para" , , , ,

2, aforesaid statements of P.W. 2 prosecutrix, aforesaid statement of P.W. 3 Sharda Mulik." , , , ,

31. In Ex. P-1 it has not been explicitly mentioned that the appellant used to beat and used to give threat to kill her. , , , ,

32. But in Ex. P-1 it has been explicitly mentioned that the appellant was giving threats to beat and cause harm to the prosecutrix. Thus, the appellant" , , , ,

does not get any help from not mentioning expressly in Ex. P-1 that the appellant used to beat and give threat to kill the prosecutrix. , , , ,

33. There is no such evidence on record on the strength of which it could be said that P.W. 3 Sharda Mulik had stated aforesaid statement because, , , ,

she had allegedly animosity with the appellant. , , , ,

34. There is no such evidence on record on the strength of which it could be said

that the aforesaid statements of P.W. 2 the prosecutrix, para 2 of",,,,,

P.W. 1 Santoshi Bai, aforesaid statement of P.W. 3 Sharda Mulik, are not simple, not natural and not normal.",,,,

35. In Ex. P-1, it has been clearly mentioned that the appellant was allegedly committing sexual intercourse with the prosecutrix.",,,,

36. Ex. P-1 has been lodged after about 2-3 year from the first incident.,,,,,

37. In the matter of State of Rajasthan -v- N.K. [(2000) 5 SCC 30, Hon'ble Supreme Court has held in para 15 as under :-",,,,

Â â??15â?|..... a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek,,,,

an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it,,,,

cannot be counted against the prosecution..... â??,.,.,,

38. In the matter of State of H.P. v. Gian Chand, (2001) 6 SCC 71, Hon'ble Supreme Court held in para 12 that delay in lodging the FIR cannot be",,,,

used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information,,,,

report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is",,,,

satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on,,,,

account of such delay, the delay would be fatal to the prosecution.",,,,

39. In the matter of State of H.P. -v- Shree Kant Shekari Â [(2004) 8 SCC 153], Hon'ble Supreme Court has held in para 18 as under :-",,,,

â??18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a",,,,

mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a,,,,

ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any,,,,

explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails",,,,

to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a",,,,

relevant factor. On the other hand, satisfactory explanation of the delay is

weighty enough to reject the plea of false implication or vulnerability of the",,,, prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere",,,, delay in lodging of the first information report does not in any way render the prosecution version brittle. These aspects were highlighted in Tulshidas,,,, Kanolkar v. State of Goa [(2003) 8 SCC 590 : 2004 SCC (Cri) 44] .â??,,,,

40. The relevant portion of para-13 of the judgment in the matter of Puran Chand -v- State of H.P. [(2014) 5 SCC 689] of the Hon'ble Supreme Court,,,, is as under :-,,,,

Â â??13. â?|.....The delay in lodging the FIR has been clearly explained by the prosecution relating the circumstance and the witnesses,,,, supporting the same have stood the test of scrutiny of the cross-examination as a result of which the version of the victim girl cannot be doubted. The,,,, delay in lodging the FIR thus stands fully explained.â??,,,,

41. This has been earlier found by this Court that 2- 3 years prior to 28-2-2013, prosecutrix was below 16 years of age, aforesaid statements of P.W.",,,, 2 prosecutrix, P.W. 3 Sharda Mulik, aforesaid statement of para 2 of P.W. 1 Santoshi Bai are simple, normal and natural. Moreover, prosecutrix is a",,,, tender aged girl. She had been disassociated from the company of the parents in some small railway station. She mistakenly reached Raigarh. She,,,, was an unknown person at Raigarh. The appellant had taken her to his house. The appellant was in a position to dominate her wish and will. It is also,,,, mentioned in Ex. P-1 that she was frightened. These circumstances are just and sufficient for causing inordinate delay in lodging Ex. P-1. Thus, this",,,, Court finds that the inordinate delay in lodging Ex. P-1 has been sufficiently explained by the prosecution. Thus, looking to the judicial precedents in",,,, the matters of NK (supra), Gian Chand (supra), Shree Kant Shekari (supra) and Puran Chand (supra), this Court finds that the inordinate delay in",,,, lodging Ex. P-1 is not fatal to the prosecution case.,,,,

42. Looking to the above-mentioned facts and circumstances, this Court finds that Ex. P-1 is normal, natural, simple and is not concocted, not",,,, fabricated.,,,,

43. In the matter of Shree Kant Shekari (supra), the Hon'ble Supreme Court has dealt with the false implication, the relevant portion of para 22 reads",,,,

as under :-,,,,

22. In any event no girl of a tender age and her parents would like to jeopardise her entire future by falsely implicating a,,,,

person alleging forcible sexual intercourseâ??,,,,

44. In the matter of Puran Chand (supra), Hon'ble supreme Court has dealt with the false implication, the relevant portion of para 14 is as under :-",,,,

14. In fact, we are prone to infer with reason that if the prosecution had an intention of really planting a false story of rape, it is highly",,,,

improbable that they would have created a story having a huge time gap between the date of incident and the date of lodgment of the FIR leaving the,,,,

scope for weakening the prosecution case. If it were a well thought out concocted story so as to lodge a false case, obviously the prosecution would",,,,

not have taken the risk of giving a time gap of more than 20 days between the incident and the lodgement of the FIR. This clinching circumstantial,,,,

evidence demolishes the defence version and inspires much confidence in what has been stated by the victim girl.â??,,,,

45. In the case in hand, the prosecutrix is a tender aged girl. Looking to the facts and circumstances of the case, there is no possibility that prosecutrix",,,,

and her mother would stake the future of the prosecutrix to falsely implicate the appellant. Thus, looking to the judicial precedents in Shree Kant",,,,

Shekari (supra) and Puran Chand (supra), this Court finds that there is no possibility of false implication of the appellant in the case in hand. Thus, this",,,,

Court disbelieves the defence of the appellant that prosecutrix had filed FIR against him only on the alleged ground that he had objected the,,,,

prosecutrix to talk with Raju on telephone.

46. Looking to the above-mentioned facts and circumstances of the case, this Court finds that the aforesaid statements of the prosecutrix get"

corroboration from the statement of para 2 of P.W. 1 Santoshi Bai, aforesaid statement of P.W. 3 Sharda Mulik, FIR Ex. P-1, aforesaid statement of"

para 4 of P.W. 5 Dr. D.K. Toppo, in that reference from Ex. P-6, aforesaid statement of para 2 of P.W. 7 Dr. Sunil Ratre, in that reference from Ex."

P-10, from report of RFSL Ex. P-19, from the concerned admitted facts of the appellant, thus, looking to the judicial precedents laid down by the"

Hon'ble Supreme Court in the matter of Mahadev (supra) and Puran Chand (supra), this Court believes the aforesaid statements of prosecutrix."

47. As per the provisions of Section 375 of the IPC, Sixthly [as per the Criminal Law (Amendment) Act, 2013 came into force on 3rd day of" ,,,,

February,2013] a man is the guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 18" ,,,,

years of age.,,,,

48. As per the definition of Section 2 (1) (d) of the POCSO Act, child means any person below the age of 18 years." ,,,,

49. In the matter of Harpal singh -v- State of Himanchal Pradesh [(1981) 1 SCC 560], which was a matter of sexual intercourse with a girl below 16" ,,,,

years of age, Hon'ble Supreme Court held that consent of girl below 16 years of age for sexual intercourse is of no consequence. The fact that no" ,,,,

injury was detected on the private part of the girl and that she was found to have been used to sexual intercourse is immaterial.,,,,

50. In the matter of Bishnu Dayal -v- State of Bihar [(1980) Suppl. SCC 358] Hon'ble Supreme Court held that consent of minor girl for sexual ,,,,

intercourse is immaterial and accused is liable for punishment under Section 376, IPC." ,,,,

51. In Shree Kant Shekari (supra), Hon'ble Supreme Court dealt with the matter of sexual intercourse with minor girl, the relevant portion of para 14 is" ,,,,

extracted herebelow :- ,,,,

Â â??14. â?|....Therefore, on the date of occurrence and even when the FIR was lodged on 20-11-1993 she was about 14 years of age. Therefore," ,,,,

the question of consent was really of no consequenceâ?? ,,,,

52. This has been earlier decided that 2-3 years prior to 28-2- 2013, the prosecutrix was below 16 years old thus looking to the above-mentioned" ,,,,

judicial precedents laid down by the Hon'ble Supreme Court in Harpal Singh (supra), Vishnu Dayal (supra) and Shree Kant Shekari (supra), this Court" ,,,,

finds that the question of consent of the prosecutrix does not arise in the case in hand.,,,,

53. In the matter of Bharwada Bhoginbhai Hirjibhai -v- State of Gujarat [(1983) 3 SCC 217], Hon'ble Supreme Court has held that in the matter of" ,,,,

offence of rape, Section 376, IPC, if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it" ,,,,

unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where having regard to the" ,,,,

circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification- Corroboration may be insisted",,,,,

upon when a woman having attained majority is found in a compromising position and there is likelihood of her having leveled such an accusation on,,,,,

account of the instinct of self preservation- Or when the 'probabilities factor' is found to be out of tune.,,,,,

54. Hon'ble Supreme Court in the matter of Sheikh Zakir -v-State of Bihar [(1983) 4 SCC 10], has held that evidence of the victim in a rape case is",,,,,

treated almost like the evidence of accomplice requiring corroboration. There must be an indication in the course of judgment that the judge had this,,,,,

rule in his mind when he prepared the judgment and if in a given case the judge finds that there is no need for such corroboration he should give,,,,,

reasonsÂ forÂ dispensingÂ withÂ suchÂ corroboration.Â ButÂ ifÂ the conviction is based on the evidence of a prosecutrix without any,,,,,

corroboration it will not be illegal on that sole ground. Whenever corroboration is necessary it should be from an independent source but it is not,,,,,

necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought,,,,,

from either direct evidence or circumstances or both.,,,,,

55. In Shree Kant Shekari (supra) Hon'ble Supreme Court in para 21 has held that :-,,,,,

Â â??21. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is,,,,,

no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness.,,,,,

In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court",,,,,

on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would",,,,,

lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice.â??"",,,,,

56. If, for the sake of the argument, it is deemed that the aforesaid statements of the prosecutrix does not get corroboration from other evidence," ,,,,,

though this Court does not find so, then this has been earlier decided that aforesaid statements of the prosecutrix is simple, natural and normal, thus",,,,,

looking to the judicial precedents laid down by the Hon'ble Supreme Court in Bharwada Bhoginbhai Hirjibhai (supra), Sheikh Zakir (supra) and Shree",,,,,

Kant Shekari (supra), this Court finds that the Court can act upon on the statements of the prosecutrix against the appellant." ,,,,

57. In the matter of Mahadev (supra), which was a case of allurement and inducement of about 15 years old prosecutrix by the appellant for making",,,,,

money by recording her bhajans on cassettes to go along with the appellant with gold ornaments from home to a different State and town, the",,,,,

appellant himself brought back the prosecutrix after 50 days upon start of investigation, the doctor found old ruptured hymen and prosecutrix used to",,,,,

sexual intercourse, the prosecutrix in her deposition gave every minute detail including keeping her in a place far from home and physical abuse for a",,,,,

month and twenty days which was not contradicted in cross-examination by the appellant, in these circumstances, the Hon'ble Supreme Court held",,,,,

that the trial Court rightly found the appellant guilty of offences charged and the High Court further upheld conviction.,,,,

58. In the matter of Puran Chand (supra), Hon'ble Apex Court has observed in para 17 as under :-",,,,,

Â â??17. In the instant matter, in view of the evidence led by the witnesses, supported by the circumstantial evidence, the prosecution version is fit to",,,,,

be relied upon brushing aside the theory of improbability of the offence and holding the prosecution case proved beyond reasonable doubt, leading to",,,,,

the conclusion that the incident in fact did happen in the manner in which it has been described by the victim girl who was only of 17 years and hence",,,,,

a minor at the time of the incident supported by the medical evidence which although might be somewhat weak, gains strength from other attending",,,,,

circumstantial evidence wherein there is no missing link in the chain of events.â??",,,,,

59. After the appreciation of the evidence discussed hereinabove, looking to the judicial precedents laid down by the Hon'ble Supreme Court in",,,,,

Mahadev (Supra) and Puran Chand (Supra) this Court finds that the prosecution has succeeded to prove the charges punishable under Sections 323",,,,,

506-B, 376 of the IPC and Section 6 of the POCSO Act against the appellant. The trial Court has not committed any illegality in convicting the",,,,,

appellant under Sections 323, 506-B and 376, IPC and Section 6 of the POCSO Act. Thus, this Court affirms the judgment of conviction passed by the",,,,,

trial Court.,,,,

60. As regards sentence awarded to the appellant for offence punishable under Sections 323 and 506-B of the IPC, considering the facts and",,,,

circumstances of the case, they appear to be just and proper, and do not call for any interference. Hence, this Court also affirms the sentences",,,,

regarding Section 323, 506-B, IPC.",,,,

61. So far as sentence awarded for offence under Section 6 of the POCSO Act is concerned, the trial Court has sentenced the appellant to undergo",,,,

imprisonment for life. Looking to the facts and circumstances of the case, it does not appear that the appellant may be sentenced for the maximum",,,,

period which is prescribed for Section 6 of the POCSO Act. It appears to be excessive and is on higher side. In the opinion of this Court, cause of",,,,

justice would be best subserved if the imprisonment for life is altered to rigorous imprisonment of 12 years. Therefore, the imprisonment for life is",,,,

reduced to rigorous imprisonment of 12 years. The fine sentences and in default of payment of fine the sentence awarded by the trial Court under all",,,,

the sections are also affirmed.,,,,

62. The appeal is accordingly partly allowed.,,,,